Denver Law Review

Volume 70
Issue 2 *Colloquy - Racism in the Wake of the Los Angeles Riots*

Article 12

January 2021

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SAVING THE PEREMPTORY CHALLENGE: THE CASE FOR A NARROW INTERPRETATION OF *McCOLLUM*

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Since the Supreme Court's decision in *Batson v. Kentucky*,[1] peremptory challenges have received a flurry of scholarly attention.[2] This response is understandable. Peremptory challenges, a method by which litigants strike jurors from the jury venire for any reason or for no reason at all,[3] were used for centuries without restriction in the Anglo-American criminal justice system.[4] In *Batson*, however, the Court held that the requirements of the Equal Protection Clause[5] could limit the prosecution's exercise of peremptory challenges. Thus, two seemingly mutually exclusive concepts were merged. Peremptory challenges, designed to give unfettered expression to parties' subjective impressions, were now reviewable under the Equal Protection Clause, which required the parties to exercise those challenges in a non-discriminatory way. This marriage spawned a persistent conflict.

Since *Batson*, scholars and judges have struggled to reconcile the rationality of equal protection with the subjectivity of peremptory challenges. Emphasizing litigants' use of race in their exercise of the peremptory challenge, commentators have argued over whether and how parties might retain their privilege to exercise peremptory challenges, in light of the race-neutral principles of the Fourteenth Amendment.

The Court's current balance, which preserves peremptory chal-

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The authors thank Kevin Downey, Judge J. William Ditter, Jr., Cynthia Farina, Steven Bihbak and Karen McDonnell for their assistance.

1. 476 U.S. 79 (1986).

2. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMPLE L. REV. 369 (1992); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

3. A peremptory challenge is defined as:

> [t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge. In most jurisdictions, each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges.

BLACK'S LAW DICTIONARY 136 (6th ed. 1990). The use of a peremptory challenge to exclude a juror is often called "striking" a juror.

4. *See infra* text accompanying notes 43-63.

5. The Equal Protection Clause provides:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1, cl. 2.

lenges but regulates them to eliminate the most extreme violations of equal protection, is well-struck. The Court's latest peremptory challenge decision, however, *Georgia v. McCollum*,[6] which subjects a criminal defendant's exercise of the peremptory challenge to Equal Protection review, may be susceptible to overbroad interpretation. Although the holding of the case technically applies only to situations where white criminal defendants strike black jurors, the decision might be read as applying to the obverse situation, where black criminal defendants challenge white jurors. We believe such a reading of *McCollum* would be unwise.

This Article analyzes the historical, doctrinal and philosophical reasons for preserving but regulating the peremptory challenge, and argues for a narrow reading of *McCollum*. Part I traces the history and development of peremptory challenges in the Anglo-American jury system, pointing out the advantages peremptory challenges were intended to give both criminal defendants and the justice system generally. Our survey of the history of peremptory challenges shows that many of the original justifications for the peremptory challenge still apply.

Part II examines the major Supreme Court cases on peremptory challenges since 1965, presenting the spectrum of solutions proposed by Supreme Court Justices for resolving the tension between equal protection values and the subjective peremptory challenge. A majority of the Court endorses a compromise regulating the use of peremptory challenges. To justify and extend this solution, the Court has shifted its focus from the equal protection rights of criminal defendants to the equal protection rights of potential jurors. This change in focus reflects a philosophical shift from liberalism, which emphasizes the rights of the opposing parties, to communitarianism, which focuses on the public interest and extends beyond any parties' immediate dispute. Since the Court's emerging priority has been to legitimate the criminal justice system in the eyes of the community, legitimation, rather than mechanical application of the rules adopted in *Batson* and its progeny, should govern the Court's decisions in future cases.

In part III we urge a narrow interpretation of *McCollum*. This argument is based on the three principal concerns expressed in these Supreme Court cases: preserving the peremptory challenge, securing equal protection and promoting community respect for and compliance with the criminal justice system. In the near future, courts may be called upon to decide whether the rules announced in the Supreme Court's post-*Batson* line of cases apply in the situation where white jurors are the subject of the peremptory challenge. An extension of the jurors' rights expressed in *McCollum* to excluded white jurors would undermine these principal concerns. If every peremptory challenge with a racial component is subject to equal protection review, the peremptory challenge will lose its power. This might well lead to the abolition of peremptory challenges, undermining the purposes the peremptory challenge has tradi-

6. 112 S. Ct. 2348 (1992).

tionally served. Extension of equal protection rights to white jurors is also doctrinally unnecessary. As long as challenges of black jurors create all-white juries, but challenges of white jurors do not create the reverse, the exclusion of white jurors will not violate the Equal Protection Clause.

Finally, the Court's philosophical shift from liberalism to communitarianism, evidenced by its increasing concern for public perception of court justice, also calls for a narrow reading of *McCollum*: if black defendants are unable to strike white jurors they "know in their hearts" to be racist, their regard for the system, arguably more precarious than that of whites, will only diminish.

I. THE ORIGIN AND HISTORY OF PEREMPTORY CHALLENGES

A. *Origins and Development of the Peremptory Challenge in England*

Peremptory challenges originated early in the life of the jury system in England.[7] Historians have not precisely identified the extent to which

7. Commentators and courts, in discussing the peremptory challenge, generally focus on its treatment by later commentators rather than on its actual origins. *See, e.g.*, Holland v. Illinois, 493 U.S. 474, 481-82(1990)(relying on nineteenth century commentator); Swain v. Alabama, 380 U.S. 202, 212-14 (1965)(relying on commentators' analyses from the eighteenth and nineteenth centuries); Broderick, *supra* note 2, at 371-74 (analyzing development of prosecutorial right to peremptory challenge beginning in the fourteenth century rather than on actual origins of the peremptory challenge).

The ancient English system administered law through the "popular courts," relying on the parties themselves to bring forward knowledgeable witnesses and to resolve disputes without input from community members. *See* James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 251 (1892). The practice of trying cases by jury replaced the "popular courts." The history of juries, amply detailed elsewhere, is beyond the scope of this article. *See, e.g.*, 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 614-31 (2d ed. 1911) (discussing origins and development of the jury system).

The Crown gradually began to rely on an inquisition system wherein jurors, knowledgeable about the events that were the subject matter of dispute, were selected by the Crown. *See id.* at 250-54 (detailing the rise of trial by inquisition as the forerunner of the modern jury system). In the criminal system, these jurors functioned in a manner akin to today's grand jury. *See* Charles L. Wells, *Early Opposition to Petty Juries in Criminal Cases*, 30 LAW Q. REV. 97, 102 (1914). They accused defendants of crimes, and then, through a variety of measures that changed over time, the royal courts decided the truth of the inquisition's accusation. The methods for determining whether an accusation made by the inquisition in a criminal case was true were primitive by today's standards. Primarily, there were two methods. The first, trial by battle, involved an actual physical battle between litigants to determine who was being truthful. The second, trial by ordeal, required a criminal defendant to suffer a series of ordeals, such as submission to heated irons, to determine the truth of his story. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 3 (1977). Henry II moved to institutionalize this evolving practice of bringing criminal suits by inquisition in the Assize of Clarendon in 1166, which mandated that:

> inquiry shall be made in every county in every hundred by the twelve most lawful men of the hundred and by the four most lawful men of the vill, upon oath that they shall speak the truth, whether in their hundred or vill there be any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers, or thieves since the King's accession.

Reprinted in THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 112-13 (1956). Henry had begun the process of institutionalizing the inquisition system. The Constitution of Clarendon in 1164 created jury trials in certain cases and provided: "The sheriff shall cause 12 legal men of the neighborhood, or of the fill, to take an oath in the

defendants enjoyed a right to peremptory challenge during the twelfth and early thirteenth centuries, although most state that criminal defendants enjoyed such a right "at common law."[8] Rather than serving as a device to protect criminal defendants, however, the challenge appears to have originated as a mechanism for the Crown to maintain control over the jury. Because the early juries served the Crown's purposes — by indicting and subjecting to ordeal those individuals who violated England's laws — the Crown wished to ensure that its jury members would be sympathetic to the Crown's interests.[9] Hence, the Crown gave itself the right to challenge an unlimited number of potential jurors peremptorily.[10] Jurors whom the Crown perceived as uncooperative would be promptly removed. The Crown also accorded criminal defendants the right to challenge jurors peremptorily in capital cases, although the rationale for doing so at that time is not clear from the historical record.[11]

The structure of and rationalizations for the jury continued to evolve throughout the fourteenth century. The primary development of this period was that the jury changed from serving merely as accuser to serving as the mechanism for determining whether the Crown's accusations were true. Initially, members of the accusing jury served on the fact finding jury as well, but by the 1340's the two functions had clearly separated.[12] Hence, the jury increasingly became the body which decided whether a defendant had actually committed a crime; its legitimacy derived in part from its role as the arbiter of truth and falsity.[13]

As the jury became more impartial and less a tool of the Crown, Parliament grew increasingly uncomfortable with the Crown's right to challenge jurors peremptorily without limit. Fearing that the practice of peremptory challenge made verdicts appear engineered by the Crown, in 1305 Parliament eliminated the Crown's right to challenge jurors peremptorily.[14] It preserved, however, the right of the criminal defendant

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presence of the bishop that they will declare the truth about [the case]." *See* LLOYD E. MOORE, THE JURY, TOOL OF KINGS, PALADIUM OF LIBERTY 35-36 (1973).

Throughout the twelfth and early thirteenth centuries, the jury continued to serve an accusatorial function rather than acting as the arbiter of the truth. MOORE, *supra*, at 35-36; *see also* Wells, *infra* note 12, at 102.

8. *See, e.g.*, MOORE, *supra* note 7, at 55 ("At common law . . . the defendant was permitted to challenge 35 jurors."); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 155 (1962).

9. *See* VAN DYKE, *supra* note 7, at 147.

10. *Id.*

11. *Id.* Numerous commentators have stated that criminal defendants enjoyed the right to challenge thirty-five jurors peremptorily in criminal cases, a number that is supported by the fact that Parliament later granted criminal defendants in capital the right to thirty-five challenges. *See* MOORE, *supra* note 7, at 55; *See also* SIR WILLIAM HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 325-26 (1903).

12. See Charles L. Wells, *The Origin of the Petty Jury*, 27 LAW Q. REV. 347, 351 (1911).

13. This development was certainly not complete in the fourteenth century, as the jury still was largely bound to follow the instructions of the Court in reaching its judgment. Nevertheless, the process that would ultimately separate the grand and petit jury (and the court and the jury) were set in motion in the fourteenth century. *See* MOORE, *supra* note 7, at 49-63.

14. An Ordinance for Inquests, 33 Edw. 1 Stat. 4 (1305) provided:

> He that challenges a Jury or Juror for the King shall shew his cause . . . .[B]ut if they that sue for the King will challenge any of those Jurors, they shall assign of

to do so.

Although the jury continued to develop in its role as neutral factfinder,[15] the English courts' treatment of the peremptory challenge remained for centuries as Parliament had fashioned it in 1305. Only criminal defendants could challenge without cause, although the number of such challenges afforded to defendants decreased over the years.[16] Thus, as the jury system underwent numerous changes from the fourteenth through the eighteenth centuries, the criminal defendant retained the right to the peremptory challenge.

B. *Historical Reasons for the Survival of the Peremptory Challenge in England*

The retention of the peremptory challenge throughout these developments appears, at first, anomalous. After all, the practice originated as a device for allowing the Crown to control the makeup of the jury. Why then did the English system preserve the right of defendants to challenge jurors long after the Crown had lost its right? Apparently the defendant's right survived because English courts and commentators rationalized the practice subsequently and infused it with new meaning. Two general rationales developed for preserving the criminal defendant's right to strike jurors without cause.

First, commentators recognized the Crown's inherent advantages in criminal proceedings and saw the peremptory challenge as a way to equalize the defendant's position. Most notable among the Crown's advantages was that its agents still controlled the selection of the larger panel from which a petit jury was chosen.[17] Therefore, as a matter of

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their Challenge a Cause Certain, and the truth of same Challenge shall be enquired of according to the Custom of the Court . . . .

15. Not until the late seventeenth century were juries generally free to arrive at verdicts without instruction from or outright coercion by the courts. *See* MOORE, *supra* note 7, at 67-89.

The single most important development in the establishment of the jury as a neutral factfinder was the decision of the appeals judges of the Court of Common Pleas in *Bushell's Case* (1670), V *State Trials* 999 (T.B. Howell, ed. 1810), where the court considered the habeas petition of jurors who had been imprisoned for finding defendants not guilty despite the insistence of the trying magistrate that the defendants were guilty. After being imprisoned, the jurors filed a habeas petition, which the Court of Common Pleas granted because, it reasoned, the purpose of the jury was to evaluate the evidence itself and reach its own conclusion. *See* VAN DYKE, *supra* note 7, at 5.

16. Parliament initially provided defendants with the right to challenge thirty-five jurors peremptorily. *See* MOORE, *supra* note 7, at 67-89. The number was decreased to twenty by 1530, and eventually to three in modern times. *See* James Gobert, *The Peremptory Challenge — An Obituary*, 1989 CRIM. L. REV. 528, 529. In 1988, Parliament abolished the criminal defendant's right to peremptory challenge. *See id.* Some commentators have made much of Parliament's ultimate decision to abolish peremptories completely. *See, e.g.*, Broderick, *supra* note 2, at 372-73. The claims of these commentators that the peremptory challenge is merely a historical anomaly are overstated, however, for they fail to account for the challenge's survival through a host of changes in English legal system for more than seven centuries. Rather than treating the peremptory challenge as anomalous, the better approach is to understand why the challenge survived for such a long period and what purposes its users believed it served.

17. *See* Holdsworth, *supra* note 11, at 325 ("In spite of the statute of 1351-52 the crown still retained means of influencing the petty jury which it only gradually relinquished. The jury was selected by [the Crown's] officers").

fairness, English courts thought it proper to allow defendants to eliminate at least some of the members of the Crown-selected panel without explanation.[18] In an oft-quoted but seldom analyzed comment, Blackstone opined that allowance of the peremptory challenge for defendants was "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous."[19]

Blackstone was referring, at least in part, to the English system's effort to conduct proceedings that *appeared* fair. Since the Crown's selection of the larger jury panel might make the trial appear hopelessly biased, and certain to end in conviction, the defendant's right to eliminate jurors whom he suspected of bias helped assuage public concerns. Hence the English system encouraged the general impression that its trials were fair, and that they merited community trust.

The second rationale for preserving the defendant's peremptory challenge was that a jury verdict appeared more legitimate and worthy of respect if both sides had implicitly consented to it.[20] If the criminal defendant could not strike jurors without cause, he would undoubtedly confront a jury comprised of some individuals whom he felt were biased against him.[21] Allowing the defendant to strike potential jurors without cause became a mechanism for ensuring that the process of trial by jury *appeared* fair, so that both litigants and the observing community would accept jury verdicts more readily.

By the time the peremptory challenge was adopted as a privilege of criminal defendants in America, therefore, it had already been justified on grounds quite different from its original roots. Nevertheless, it had become an important part of the jury system, both because it enhanced the truth-seeking character of trials and because it legitimated the jury system in the eyes of both the litigants and the community.

C. *The Peremptory Challenge in America*

The American colonies retained the defendant's right to peremptorily challenge jurors as part of the inherited common law,[22] and after independence, Congress codified the defendant's right to challenge ju-

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18. *See id.* at 324.

19. 4 WILLIAM BLACKSTONE, COMMENTARIES, * 353 (1859).

20. *Id.* ("[A] prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.").

21. *See* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 552 (1975) (noting that, in many cases, defendants want to strike jurors that they feel are biased against them but against whom they cannot demonstrate cause to strike). Blackstone noted that the voir dire itself might bias a juror against a criminal defendant

> [U]pon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

BLACKSTONE, *supra* note 19, at * 353.

22. *See* VAN DYKE, *supra* note 7, at 148.

rors peremptorily in federal court.[23] During the nineteenth century, American prosecutors also acquired the right to exercise such challenges, and by the beginning of the twentieth century, the prosecution's right to challenge peremptorily was well established.[24]

Two aspects of the use of the peremptory challenge in America merit special mention. First, for much of the twentieth century, the use of the peremptory challenge, particularly by the prosecution, served to manifest racial discrimination and irrational prejudice rather than to balance the scales between the state and the accused. Literature detailing the use of the peremptory challenge in a racially discriminatory manner is legion.[25] Because the number of potential black jurors on any particular venire was generally small, the prosecution typically had enough peremptory challenges to strike all the eligible blacks from the jury.[26] Thus, with its peremptory challenges, the state could often guarantee an all-white jury, which it believed was more favorable to the prosecution than one which was racially-mixed. In cases involving black criminal defendants, the peremptory challenge thus became an instrument of the very evil it was designed to protect against: the state could engineer the selection of a jury which was, on balance, thought to favor the state.

Second, although the use of the peremptory challenge was commonplace, the Supreme Court held that criminal defendants did not have a constitutional right to exercise the peremptory challenge.[27] Hence, the doctrinal rationale for the peremptory challenge in the criminal system was precarious. Nevertheless, the peremptory challenge, as a matter of history and philosophy, was well entrenched. The practice not only survived in the Anglo-American system of justice for more than seven centuries, but it continued to serve a legitimating function in the criminal justice system by sustaining the appearance that both the prosecution and defense accepted a given jury as fair and impartial.

Ultimately, abuse of the peremptory challenge to exclude black jurors led to the questioning of the philosophical premises that justified its existence. In recent years, courts and commentators have tried to find new doctrinal and philosophical explanations for preserving, abolishing or regulating the use of the peremptory challenge.

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23. *See* 1 Stats. 119, ch. 9 (1790).

24. *See* VAN DYKE, *supra* note 7, at 150 (tracing the development of the prosecutorial right to peremptory challenge in various American jurisdictions throughout the nineteenth century).

25. *See, e.g.*, Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 206-09 (1978); Toni M. Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501, 509 (1986).

26. *See* Colbert, *supra* note 2, at 88-93.

27. *See* Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.").

II. MODERN APPROACHES TO PEREMPTORY CHALLENGES

A. *Supreme Court Case Law Since 1965*

The Supreme Court first considered the application of the Equal Protection Clause to peremptory challenges in *Swain v. Alabama*.[28] In *Swain*, a black defendant was accused and subsequently convicted of raping a white woman. Following voir dire, the prosecution used its peremptory challenges to strike all six eligible black venire members.[29] Swain argued that this violated his right to equal protection of the laws. The Supreme Court disagreed, finding that Swain had failed to prove the prosecution struck those venire members solely on the basis of race. The Court held that in order to demonstrate an equal protection violation based on the state's racially discriminatory use of peremptory challenges, a petitioner must show that the prosecutor systematically used race discrimination over a significant period of time.[30] Because Swain had, at best, merely demonstrated that such racially motivated challenges occurred in his case, he had not demonstrated an equal protection violation. Although the *Swain* Court technically applied the Equal Protection Clause to peremptory challenges, the evidentiary requirement for demonstrating an equal protection violation was so high that *Swain* effectively precluded equal protection challenges to peremptory challenges.

Despite much criticism,[31] *Swain*'s framework for evaluating equal protection claims in a peremptory challenge context remained the law for twenty years. In 1986, however, the Supreme Court overruled *Swain*. In *Batson v. Kentucky*[32], a black defendant challenged the prosecution's use of its peremptory challenges to strike all the potential black jurors as violative of equal protection principles. The Court agreed, holding that purposeful race discrimination in violation of the Equal Protection Clause could be established in a particular case provided that the defendant demonstrate that: 1) he is a member of a cognizable racial group; 2) the prosecutor struck venire members of that group; and 3) the facts or other circumstances in the case raise an inference of the prosecutor's intent to exclude those members on the basis of race.[33]

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28. 380 U.S. 202 (1965).

29. *Id.* at 205.

30. The Court reasoned:

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. . . . [T]he defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time.

Id. at 227.

31. *See, e.g.*, Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966); *Constitutional Law, The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 135 (1965); Comment, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1965).

32. 476 U.S. 79 (1986).

33. *Id.*

Upon the defense meeting these requirements, the burden shifts to the state to come forward with a race-neutral explanation for its exercise of the peremptory challenge.[34] The Court's decision made clear that it was equal protection, and not concerns about a defendant's Sixth Amendment rights to a fair trial and impartial jury, that required regulation and limitation of the state's right to peremptory challenges.[35]

Batson, however, left unanswered the question of how far the Equal Protection Clause extended its prohibition of racially discriminatory peremptory challenges. In *Powers v. Ohio*,[36] the Court began to define the extent of the Equal Protection Clause's prohibition of racially biased peremptory challenges. In *Powers*, a white criminal defendant objected to the prosecution's exclusion of black jurors from the venire. Powers did not claim that his own Sixth Amendment rights had been infringed by the peremptory challenges, but rather that the Equal Protection rights of the excluded jurors had been violated.[37] Powers further argued that he had third-party standing to assert the juror's rights.[38] The Court agreed and held that under *Batson*, a white defendant can object to the prosecutor's use of peremptory challenges to exclude non-white jurors. The Court interpreted *Batson* as finding an equal protection violation of both the excluded jurors' rights and those of the criminal defendant. Therefore, the Court concluded that regardless of the race of the criminal defendant, racially motivated peremptory challenges violate the Equal Protection Clause. The Court reasoned that, in addition to the harm to the defendant, racially discriminatory peremptory challenges also harm the excluded jurors and society.[39] *Powers* thus opened

34. *Id.* at 95.

35. Nevertheless, the Court soon confronted a challenge to the prosecution's exercise of peremptory challenges rooted in the Sixth Amendment. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S. CONST. amend. VI, cl. 1.

In *Holland v. Illinois*, 493 U.S. 474 (1990), a white criminal defendant challenged the state's exclusion of the only two black jurors from the venire as violative of the Sixth Amendment's mandate that he be tried by an impartial jury representing a fair cross-section of the community. The Court held that while the Equal Protection clause forbids the use of peremptory challenges in a racially discriminatory manner, the Sixth Amendment does not prohibit the state from using peremptory challenges in any manner that it sees fit. This includes a racially discriminatory use. Writing for the Court, Justice Scalia reasoned that the Sixth Amendment guarantees an impartial jury, not a representative one. The Supreme Court's decision foreclosed any chance of grounding constitutional challenges to racially discriminatory peremptory challenges in the Sixth Amendment. *Id.* at 480. The Court did hold, however, that under the Sixth Amendment a white defendant has standing to object to the exclusion of black jurors. *Id.*

36. 111 S. Ct. 1364 (1991).

37. *Id.* at 1366-67.

38. *Id.* at 1370.

39. Writing for the Court, Justice Kennedy reasoned:

> In *Batson*, we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But we did not limit our discussion in *Batson* to that one aspect of the harm caused by the violation. . . . *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.

111 S. Ct. at 1368 (citation omitted).

the door to application of the Equal Protection Clause based on the identity of the excluded jurors rather than solely on the identity of the defendant.

The Court extended the rule prohibiting racially-biased peremptory challenges to both plaintiffs and defendants in *civil* cases in *Edmonson v. Leesville Concrete Co.*,[40] largely relying on its analysis in *Powers*. In a final extension of *Powers*, in *Georgia v. McCollum*[41] the Court held that a white criminal *defendant's* use of peremptory challenges to strike black jurors on the basis of race violates the Equal Protection Clause. In both *Edmonson* and *Powers*, the Court emphasized that the equal protection rights of the jurors could be asserted by the litigants, and that it was the deprivation of those jurors' rights which was the basis for regulating peremptory challenges.

Throughout each of these cases, distinct voices have emerged proposing how to reconcile the seemingly arbitrary and capricious[42] peremptory challenge with the rational demands of equal protection. These different voices articulate divergent doctrinal and philosophical theories in dealing with the peremptory challenge.

B. *Solutions to the Peremptory Challenge - Equal Protection Conflict*

1. Justice Marshall and the Argument for Elimination of Peremptory Challenges

The opinions in *Batson* set forth the range of possible solutions to the peremptory challenge-equal protection dichotomy. On one end of the spectrum is Justice Marshall, who concurred in the judgment in *Batson*, but argued that the majority did not go far enough towards ensuring the vindication of equal protection values. He claimed that peremptory challenges must be abolished altogether.[43] Merely permitting judicial scrutiny of prosecutors' peremptory challenges does not, according to Justice Marshall, end the racial discrimination which peremptory challenges inject into the jury-selection process.[44] Therefore, in order to redeem the "right of the defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment,"[45] the prosecution's peremptory challenge right should be abolished altogether.[46] Justice Marshall concluded that because "between [the defendant] and the state the scales are to be evenly held,"[47] the right of defendants to exercise peremptory challenges must be abolished as well.[48]

40. 111 S. Ct. 2077, 2088 (1991).
41. 112 S. Ct. 2348, 2359 (1992).
42. *See* Lewis v. United States, 146 U.S. 370, 378 (1892).
43. Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).
44. *Id.*
45. *Id.* at 107 (citation omitted).
46. *Id.* 102-03.
47. *Id.* at 107 (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).
48. Of course, such formal equality had not been required for the five centuries or so between 1305 and the 1800's, when prosecutors re-acquired the right to exercise peremptory challenges in this country. See *supra* notes 12-24 and accompanying text.

2. Chief Justice Burger and the Argument for Unfettered Peremptory Challenges

At the other end of the spectrum, Chief Justice Burger, dissenting in *Batson*, argued that peremptory challenges should be preserved with all their prejudices, racial and otherwise, intact.[49] Chief Justice Burger emphasized that prosecutors often use peremptory challenges not to exploit prejudice but to eliminate it. He asserted that the peremptory challenge carefully permits "the covert expression of what we dare not say but know is true more often than not."[50] The dissent further emphasized the inapplicability of equal protection doctrine to the peremptory challenge because of the inherently unaccountable nature of the peremptory challenge.[51]

Justice Thomas, concurring in *McCollum*,[52] would later echo Justice Burger's reluctance to apply equal protection doctrine to peremptory challenges. Justice Thomas argued that the early equal protection cases were *premised* on the recognition that racism plagues juries and that the racial composition of juries can affect case results.[53] He stated that because racial composition continues to makes a difference in a jury's decision, some defendants exercise race-based peremptory challenges solely to counterbalance *jurors'* covert but pernicious biases.[54] Subjecting defendants' peremptory challenges to the Court's review, he argued, with the lofty goal of eliminating racism from the courtroom, may actually deprive defendants of their only tool to strike racist jurors from the jury panels.[55] In any event, Justice Thomas argued, as Chief Justice Burger had, that the advantages of subjective, unexplained peremptory challenges to the defendant outweigh "the community's" nebulous interest in aspirational statements from the Court about racial equality.[56]

Chief Justice Burger and Justice Marshall, at opposite ends of the spectrum agreed that the Court's solution of regulating the peremptory

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49. *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting).

50. *Id.* at 121 (quoting Babcock, *supra* note 21, at 553-54).

51. Chief Justice Burger wrote:

> [I]n making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "an arbitrary and capricious right."

Id. at 123 (citations omitted).

52. 112 S. Ct. 2348, 2359 (1992) (Thomas, J., concurring).

53. Justice Thomas quoted Strauder v. West Virginia, 100 U.S. 303 (1879), the first case to hold that de jure exclusion of blacks from jury venires violated a black defendant's right to equal protection:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of the protection which others enjoy.

McCollum, 112 S. Ct. at 2360 (quoting *Strauder*, 100 U.S. at 309).

54. *McCollum*, 112 S. Ct. at 2360.

55. *Id.*

56. *Id.*

challenge in light of the Equal Protection Clause would not solve the problem. And, interestingly, both argued that their solutions would strengthen the public's faith in the jury system — Justice Marshall's by eliminating the irreparably racist practice of peremptory challenges, and Chief Justice Burger's by preserving the one device designed to maximize public trust in jury verdicts.[57] The majority of the Court chose a middle ground, however.

3. Justices Kennedy and Blackmun and A Regulatory Compromise

The majority of the *Batson* Court adopted a regulatory compromise, initially in the name of the criminal defendant. The Court's solution in *Batson*, which rejected both Justice Marshall's and Chief Justice Burger's more extreme proposals, was to review the peremptory challenges of prosecutors to eliminate the worst excesses of racial discrimination. Initially, this compromise was seen as a means of protecting the rights of the criminal defendant. Only subsequently would the Court see the compromise as a means of protecting the "public interest" or public concern for the jury system.

a. *Preserving Peremptory Challenges*

The Court rejected Justice Marshall's proposal, to eliminate all peremptory challenges in the goal of racial equality, because of the peremtory's historical and actual benefits. Summarizing the Court's cumulative respect for the peremptory challenge in *Holland*, Justice Scalia stated that the peremptory challenge plays an important and necessary role in a jury trial by striking out the partiality on both sides, thus eliminating bias from the jury.[58] Nevertheless, however, the Court has reiterated that the peremptory challenge is not constitutionally guaranteed.[59] Yet its resistance to the proposal to abolish all peremptory challenges survives, for many of the same reasons that have prompted English-speaking courts to preserve peremptory challenges since the fourteenth century. Peremptory challenges both make juries fairer and give the *appearance* of making juries fairer.[60] Only abuse of peremptory challenges subverts the intent to make juries more fair. As a result, the Court concluded peremptory challenges need to be regulated. Total elimination of peremptory challenges would leave open the risk of losing their original advantages. Without any peremptory challenges, de-

57. *See supra* notes 43-51 and accompanying text.

58. Justice Scalia stated:

> We have acknowledged that [the peremptory challenge] occupies "an important position in our trial procedures," and has indeed been considered "a necessary part of trial by jury." Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides," thereby "assuring the selection of a qualified and unbiased jury.

Holland v. Illinois, 493 U.S. 474, 484 (1990) (citations omitted).

59. *Batson*, 476 U.S. 79, 108 (Marshall, J., concurring); Frazier v. United States, 335 U.S. 497, 505 n.11 (1948); Stilson v. United States, 250 U.S. 583, 586 (1919).

60. *See supra* text accompanying notes 17-21.

fendants may well be judged by jurors they believe are biased against them.[61] In addition, public knowledge that an individual litigant has the right to strike a juror bolsters the public's confidence in the justice system.[62]

Finally, if the proposal that peremptory challenges be eliminated is made in the name of racial equality, it must also be recognized that even though elimination of peremptories may raise the number of minority jurors, it may do so at the expense of minority defendants. Defendants who suspect racism among potential jurors, but who cannot strike them without cause, may suffer the effects of discrimination in a far more devastating and final way than do jurors who are not allowed to serve on a jury.

b. *Securing Equal Protection*

While insisting on preserving the peremptory challenge, the Court since *Batson* has resisted with equal resolve proposals to retreat from its equal protection rationale for regulating these challenges. Arguments that equal protection analysis cannot be applied to peremptory challenges because of the inherently unaccountable nature of peremptory challenges are flawed. For many years, before equal protection regulation of peremptory challenges, prosecutors often rampantly abused the peremptory challenge by exploiting and perpetuating racial stereotypes and discrimination.[63] It is true that peremptory challenges are meant to be unaccountable and subjective. On the other hand, they are not meant to accommodate every hateful and prejudiced thought a litigant may have. Thus, the Court had reasoned, regulation of peremptory challenges is necessary to secure equal protection for everyone involved with the trial.

c. *The Majority's Solution*

Finding a middle ground between the abolition of peremptory challenges and complete, laissez-faire indifference to their application, a majority of the Supreme Court in *Batson* accepted a regulatory solution. This regulation is necessary to preserve the right of peremptory challenges, but to prevent that right from being exercised in a way which violates the Equal Protection Clause. The Court has endorsed this solution in each subsequent peremptory challenge case, extending the reach of restrictions—from the prosecution trying a black defendant in *Batson*, a white defendant in *Powers*, to all civil litigants in *Edmonson*, to all criminal defendants in *McCollum*.

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61. *See* VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY 72-73 (1986) ("Suppose that you are involved in a legal case and you are convinced that a particular prospective juror is biased against you, even though the judge doesn't share your insight. The option of eliminating that person through a peremptory challenge may help you to accept the verdict as reasonable even if it should not be in your favor.").

62. Georgia v. McCollum, 112 S.Ct. 2348, 2354 (1992); *see also* BLACKSTONE, *supra* note 19, at * 353.

63. *See* sources cited *supra* note 2.

An important change took place in the Court's doctrinal analysis from *Batson* to the most recent decision in *McCollum*. While in *Batson* the Court alluded to concerns about public confidence in the judicial system, the focus of its holding was entirely on the equal protection rights of the defendant. Slowly, however, the Court began to focus not on the parties' rights but on the equal protection rights of the *jurors*. This shift in focus from parties to jurors, who sit as a proxy for the public generally, reflects a willingness by the Court to effectuate two goals: first, to honor communitarian or "public interest" ideals even in criminal procedure; and second, and even more striking, to honor these public interest ideals to the *detriment* of a criminal defendant.

C. *The Court's Underlying Doctrinal Shift*

The Court's change in focus from criminal defendant to juror evolved slowly. Both *Swain* and *Batson* based their holdings on the equal protection rights of the defendant. In dicta, the *Batson* Court referred to concerns about excluded jurors[64] and cited the need to preserve public confidence in the judicial system.[65] Its holding, however, emphasized that a defendant's equal protection right is denied when he is tried by a jury from which all eligible members of his race have been purposefully excluded.[66]

The juror-centered approach did not reach full fruition until later cases. Concurring in *Holland*, in which the Court to bolster the result in *Batson* with the Sixth Amendment, Justice Kennedy cited *Batson*'s "established rule" — that "exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights."[67] Subsequently, the Court reaffirmed and expanded this interpretation of *Batson*. Writing for the majority in *Powers* the following year, Justice Kennedy acknowledged that a juror struck on a basis of a discriminatory peremptory challenge suffered harm. As a result the community was harmed as well.[68] The Court held that a juror has a

64. Batson v. Kentucky, 476 U.S. 79, 87 (1986). ("As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." (citations omitted)).

65. *Id.*

66. Even Justice Marshall, whose proposal to eliminate peremptory challenges took into consideration the general, societal interest in racial equality, did not take the dispute in *Batson* outside the rights of the parties. He wrote: "Justice Goldberg, dissenting in *Swain*, emphasized that '[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.' I believe that this case presents just such a choice." 476 U.S. at 107 (Marshall, J., concurring) (quoting Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting).

67. Holland v. Illinois, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring)(citation omitted).

68. Justice Kennedy wrote:

> *Batson* was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors. *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large (internal citations omitted).

right not to be excluded from juror service because of the juror's race. As a result, a prosecutor cannot exclude a qualified juror solely because of the juror's race.[69]

Justice Kennedy emphasized both the importance of civic contributions and the value of jury participation, stating that allowing citizens to participate in the justice system was a main reason for the jury system.[70] Quoting *Balzac v. Puerto Rico*,[71] he noted that by participating in a jury, a juror can prevent abuse of the judicial system,[72] and that a juror can influence judicial decisions and the direction of society.[73] He concluded with the observation that jury service safeguarded the law's democratic component by protecting the litigants' rights and insuring the public's tolerance of the law.[74] *Powers*, therefore, fully focused the Court on the rights of jurors rather than on the rights of defendants.[75]

Thus, by the time the Court considered the issues raised in *Edmonson*, the majority of the Court was comfortable with Kennedy's assertion that it was the jurors' equal protection rights that were at issue. Justice Kennedy now moved those jurors to the core of his holding, stating that racial bias was improper in the courtroom, "race-based exclusion violates the equal protection rights of the challenged jurors."[76] *Edmonson* considered the rights of litigants to use race in peremptory challenges in *civil* cases, which made the centrality of jurors much easier to accept. In

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Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991) (citations omitted).

69. The Court stated:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.

Id. at 1370.

70. Justice Kennedy wrote:

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.

Id. at 1368 (citations omitted).

71. 258 U.S. 298 (1922).

72. Kennedy stated:

> The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

Powers, 111 S.Ct. at 1368 (quoting *Balzac*, 258 U.S. at 310).

73. Justice Kennedy wrote:

> The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority and invests the people, or that class of citizens, with the direction of society.

Id. (quoting 1 DEMOCRACY IN AMERICA 334-337 (Schocker, 1st ed. 1461)).

74. Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people.

Id. at 1369 (citations omitted).

75. The Court's concern for minorities' participation in civic life echoes its reasoning in Voting Rights Act cases. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986). Moreover, it continues the trend of giving constitutional protection to practices which help involve historically excluded groups in civic life.

76. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991).

the civil context, the rights of non-parties have always been more readily considered,[77] and the notion that litigants' rights must accommodate jurors' rights is palatable, if not universally accepted. But in *McCollum*, which subjected the *criminal defendant's* exercise of peremptory challenges to review for violations of the Equal Protection Clause, the Court seemingly transferred the language of jurors' rights from the civil context to the criminal.[78] In *McCollum*, the Court began its reasoning by explaining that regardless of whether a defendant or prosecutor excluded a juror because of race, the juror was exposed to racial discrimination.[79] The Court further couched jurors' rights explicitly in the need for public confidence in the judicial system.[80] The Court noted that this was especially true in race-related cases.[81]

Thus the Court's focus underwent a complete transformation. From the holding in *Batson*, that a black defendant's right to equal protection may be violated when all eligible black jurors are systematically excluded, the Court has come to hold that the rights of jurors — indeed, the rights of the whole community — are violated when a juror is struck on the basis of race.

The Court's shift in focus from defendant to jurors in its equal protection analysis prompted a caustic response from Justices who disapproved. Dissenting in *Powers*, which was the first case in which a majority of the Court cited *Batson* as holding that a prosecutor's discriminatory use of peremptory challenges harmed the excluded jurors and the community at large, Justice Scalia charged the majority with abandoning the purposes of both *Strauder* and the Fourteenth Amendment.[82] He argued that the Fourteenth Amendment was designed to guarantee blacks protection of the laws equal to that of whites. The Court's new shift to protect black *jurors*, Justice Scalia argued, gave *white* defendants the use of a doctrine created to balance *blacks'* chances in a racist society. He lamented the distortion of equal protection jurisprudence and predicted the Court's "self-satisfying," supposed "blow against racism"[83] would jeopardize peremptory challenges and equal protection analysis

77. *See infra* text accompanying notes 101-03.

78. Georgia v. McCollum, 112 S. Ct. 2348, 2354-57 (1992).

79. *Id.* at 2353.

80. Citing *Powers*, Justice Blackmun wrote:

> One of the goals of our jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.

Id. at 2353-54 (citations omitted).

81. The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.

> Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice — our citizens' confidence in it.

Id. at 2353-54 (citations omitted).

82. Powers v. Ohio, 111 S. Ct. 1364, 1374-75 (1991)(Scalia, J., dissenting).

83. *Id.* at 1382.

altogether.[84]

Concurring in *McCollum*, Justice Thomas echoed Justice Scalia's concern and called the Court's shift in emphasis from the criminal defendant's rights to the rights of jurors "a serious misordering of our priorities."[85] Justice Thomas argued this shift elevated juror's rights at the expense of the defendant's.[86] Nonetheless, a majority of Justices have approved the shift in the focus of the equal protection analysis. As Justices Scalia and Thomas suggested, however, the implications of "exalt[ing] the right of citizens to sit on juries over the rights of the criminal defendant"[87] may signal significant changes in the law of criminal procedure.

D. *The Ideological Significance of the Shift*

The Court's change in focus from the defendant's rights to the jurors' reflects its willingness to import communitarian principles to the law of criminal procedure, an area traditionally reserved for liberal or individualist principles of law.[88] Scholars have traced the developments of both liberalism and communitarianism from the earliest of the Constitutional Framers' writings[89] through recent Supreme Court decisions.[90] For our purposes, however, we need only recognize the trademark principles of liberalism and communitarianism (or republicanism[91]), in order to place the Court's shift in equal protection analysis in philosophical perspective.

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84. In particular, Justice Scalia predicted the standing problems the Court's decision was likely to create. "While [*Batson*] refers to 'the harm' that 'discriminatory jury selection' inflicts upon 'the excluded juror,' that is not a clear recognition, even in dictum, that the excluded juror has his own cause of action—any more than its accompanying reference to the harm inflicted upon 'the entire community,' suggests that the entire community has a cause of action." *Id.* at 1379 (citations omitted).

85. Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992)(Thomas, J., concurring).

86. Justice Thomas wrote:

> In *Strauder*, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during voir dire, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. . . . In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.

Id.

87. *Id.*

88. *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); JOHN P. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST AND THE FOUNDATIONS OF LIBERALISM (1980); JOHN GREVILLE AGARD POCOCK, THE MACHIAVELLIAN MOMENT (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); Frank I. Michelman, *The Supreme Court, 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

89. *See* Wood, *supra* note 88.

90. *See, e.g.*, Frank I. Michelman, *The Republican Civic Tradition: Law's Republic*, 97 YALE L.J. 1493 (1988) (arguing traditional civic republican theory supports protection of individual rights, in context of Bowers v. Hardwick, 478 U.S. 186 (1986)).

91. We call the public-centered philosophy "communitarianism," which encompasses several community-minded critiques of liberalism, including republicanism. For an excellent discussion of the recurrence of communitarian critiques, see Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990).

Professor Morton Horwitz has contrasted[92] the two philosophies concisely:

> Liberalism has stood for a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society, a night-watchman state, and denial of any conception of an autonomous public interest independent of the sum of individual interests. Republicanism has stood for the primacy of politics and the relative independence of ideals of the good life from economic forces. It has emphasized the growth and development of human personality in active political life. It has proceeded from some objective conception of the public interest and conceived of a state that could legitimately promote virtue.[93]

Stated in these terms, the Supreme Court's shift regarding peremptory challenges reflects a profound change in philosophical emphasis. The change in emphasis from *Batson*, stressing the inviolable rights of the criminal defendant, to *Powers*, stressing the jurors' interests in not being excluded from a "significant opportunity to participate in civic life,"[94] to *McCollum*, which highlighted society's interest in not "undermin[ing] the very foundation of our system of justice—our citizens' confidence in it"[95] reflects an emergence of communitarian priorities in the Court's treatment of peremptory challenges.

The Court's initial emphasis in *Swain* and *Batson* on the criminal defendant's rights reflects the liberalist tradition. In the liberal model of criminal justice, the state battles the accused, each armed to fight fairly in its own self-interest. The state may prosecute zealously so long as it respects the bounds of the defendant's inviolable rights.[96] The Court, as night-watchman, monitors the prosecution to be sure these bounds are respected. The criminal trial, therefore, gives each party the opportunity to vigorously argue its self-interest, that "legitimate animating force"[97] from which the truth of the criminal charges is determined. It is this contest between interested parties, ostensibly made fairer by the exercise of peremptory challenges, from which justice will result.

Communitarian priorities, however, emphasize what Horwitz calls the public interest, which includes the needs of people affected indirectly, although perhaps profoundly, by any particular case before the court. The opinions in *Powers*, *Edmonson* and *McCollum* speak the language of communitarianism. These majority opinions emphasize the

92. Liberalism and republicanism are widely thought to be at odds with each other. However, for a suggestion that "liberal republicanism" comprises both, see Cass R. Sunstein, *The Republican Civic Tradition: Beyond the Republican Revival*, 97 YALE L.J. 1539, 1567-1571 (1988).

93. Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1832 (1987).

94. Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991).

95. Georgia v. McCollum 112 S. Ct. 2348, 2354 (1992).

96. The defendant's shields are guaranteed by the Constitution. They include the right against unreasonable searches and seizures, U.S. CONST. amend. IV; the right against double jeopardy, U.S. CONST. amend. V; and the right to a "speedy and public trial, by an impartial jury," U.S. CONST. amend. VI.

97. Horwitz, *supra* note 93, at 1832.

"growth and development of [the excluded jurors'] human personality in active political life," beginning from an "objective conception of the public interest."[98] That interest includes, at least for Justice Blackmun in *McCollum*, the promotion of racial harmony in communities which have suffered racially-motivated crime.[99]

The emergence of communitarian principles in the law of peremptory challenges has uncertain significance. On the one hand, it reflects those historical justification which valued the peremptory challenge contributions to the public perception that jury trials were fair.[100] On the other hand, however, considerations of public confidence and the appearance of impartiality had never before been used to diminish, rather than augment, the rights of criminal defendants. Whereas the defendant's right to the peremptory challenge was preserved after the Crown had lost that right, the defendant's right was preserved because it helped sustain public faith in juries' determinations. *McCollum*, in contrast, represents a willingness to nurture public confidence at the *expense* of the defendant. This use of communitarian principles is a new and dramatic shift, indeed.

In one sense, the preference for "public interest" considerations at all in criminal procedure is unusual. Several areas of civil law explicitly take non-parties' interests into account. For example, tort law often expressly considers long-range, communal good in determining optimal tort liability schemes.[101] Domestic relations law considers the interests of children in divorce proceedings between parents.[102] More generally, the provisions for third party practice, class actions, and intervention provide for complex civil litigation in which many parties with an interest in a dispute can be included.[103]

Moreover, the substance of criminal law also regards some "objective conception of the public interest."[104] Statutory prohibitions against murder, rape and robbery reflect a societal desire to outlaw and prevent these acts. But criminal procedure has been a traditionally *liberal* field of law. Perhaps because its strictures are set out in relative detail in the Bill of Rights, the law of criminal investigation and prosecution reflects the individualist model of state versus accused. It might be said that in criminal *punishment*, general (as opposed to specific) deterrence projects the "public interest," or that punishment's retributive goals satisfy the need for communal perception that justice is being served. But for the most

98. *McCollum*, 112 S. Ct. at 2348.

99. *Id.* at 2354.

100. *See supra* notes 17-21 and accompanying text.

101. *See, e.g.*, G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 221 (1980) (discussing trend in tort law to minimize overall social costs by imposing liability on the "cheaper cost-avoider").

102. For example, courts are said to have inherent power to protect children, which allows them to shape domestic remedies regardless of the desires of the parties. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 238 (1987) (collecting cases).

103. *See* FED. R. CIV. P. 19-24.

104. Horwitz, *supra* note 93, at 1832.

part, throughout investigation and trial, any person's interests which might compromise the defendant's are given little consideration.

Therefore, the implications of the Court's willingness in *McCollum* to consider the public interest at the expense of the criminal defendant may be profound. On the one hand, it is unlikely that the Court will move toward a communitarian jurisprudence at every level of criminal prosecution. While the Court did apply communitarian principles to the peremptory challenge, that practice, unlike the shields guaranteed by the Fourth, Fifth and Sixth Amendments, is not constitutionally guaranteed.[105] It is therefore more susceptible to manipulation or change based on policy- or community-oriented considerations. On the other hand, however, the Court's eager defense of jurors' rights at the expense of defendants' rights signals a vision into criminal jurisprudence which may inadequately protect defendants. The crucial next step must be to interpret *McCollum* very narrowly.

III. THE FUTURE OF THE *BATSON* LINE OF CASES

The Supreme Court has charted a course for regulating peremptory challenges to protect the equal protection rights of jurors. The question remains, however, how to define the scope of these rights. Under the Court's current holdings, the rights of black prospective jurors can be asserted by black criminal defendants (*Batson*), white criminal defendants (*Powers*), civil litigants (*Edmonson*) and criminal prosecutors (*McCollum*). What remains to be decided, however, is whether, as Justice Thomas predicted in his *McCollum* concurrence, the same result must ensue when the criminal defendants are black (or members of other minority groups) and the challenged jurors are white. Must the rights of minority jurors not to be challenged peremptorily on the basis of race, as so far defined by the Supreme Court, extend equally to whites?[106] An analysis of the doctrinal and ideological concerns surrounding peremptory challenges leads to the conclusion that the rules of the post-*Batson* line of cases should not apply when the challenged jurors are white.

A. *Doctrinal Analysis*

There are two potential doctrinal arguments that reason against applying the *Batson* line of cases to challenges of white jurors. First, as a matter of basic equal protection doctrine, differential treatment of white jurors is arguably subject to a lower level of scrutiny than differential treatment of blacks, or members of other suspect classes.[107] If the terminology of levels of scrutiny were applied in peremptory challenge

105. *See supra* note 27.

106. The Supreme Court has rigorously applied strict race neutrality in other equal protection contexts. *See* City of Richmond v. Croson, 488 U.S. 469 (1989) (striking down local ordinance designed to guarantee a certain percentage of work projects for minority-owned businesses).

107. *See* Hunter v. Erickson, 393 U.S. 385, 391-92 (1969) ("Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified distinctions based on race, racial classifications are 'constitutionally suspect, subject to the 'most rigid scru-

cases, a party asserting the interests of white jurors not to be struck from a jury on the basis of race would be required to prove that those jurors' exclusion is not rationally related to a legitimate state interest.[108] Black jurors, on the other hand, speaking through any of the above-named parties, would only have to show that those jurors' exclusion is not narrowly tailored to further a compelling governmental interest.

The terminology of levels of scrutiny has never been used in the peremptory challenge cases, however, because "purposeful racial discrimination," rather than racial classification, is involved in a prosecutor's racially motivated use of peremptory challenges.[109] The argument that classification of whites is treated differently for equal protection purposes is likely irrelevant, since the exclusion of white jurors could still involve purposeful racial discrimination. Given that any purposeful racial discrimination is presumptively prohibited by the *Batson* line of cases, the question becomes whether a black defendant's striking of white jurors constitutes "purposeful racial discrimination."

The second doctrinal reason for not applying *McCollum* in cases involving white jurors involves the reality surrounding a black defendant's challenge of white jurors, which strongly suggests that no such "purposeful racial discrimination" is involved.[110] In every significant peremptory challenge case that the Supreme Court has confronted to date, *all* black members of the venire eligible to sit on the jury were struck. White parties successfully sought all-white juries, believing that their chances of acquittal (or conviction, in the case of the government) before a jury of their racial peers were better.[111] Therefore, the striking of black jurors led to a jury of a particular racial composition.

Because blacks frequently constitute only a tiny percentage of the venire,[112] black defendants striking white jurors often have a different purpose in mind. Since they can seldom use peremptory challenges to create juries made up entirely of their own race, black defendants may strike white jurors in order to keep *some* representation of members of their own race on the jury. They are trying to assure, rather than prevent, racially mixed juries. The Supreme Court's equal protection rule, designed to prevent exclusion of a certain race from a jury, does not also bar the exclusion of jurors whose race is not in danger of full exclusion. In other words, while a black criminal defendant might strike a white juror on the basis of race, as Justice Thomas hypothesized in *McCollum*,

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tiny.' They 'bear a far heavier burden of justification' than other classifications." (citations omitted)).

108. *See id.*

109. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986).

110. Indeed, as a practical matter, prosecutors arguing for a wooden application of *McCollum* could often make out a prima facie case of racial discrimination when a black defendant uses his peremptories to strike only white jurors (or, indeed, when *any* litigant uses his peremptories to strike only white jurors). Such a broad application of the rule would not advance the purposes of equal protection because the jury would likely retain a high degree of white representation.

111. Obviously in *Powers*, the white defendant from whose jury the prosecutor had struck all eligible blacks, fared poorly anyway.

112. *See* Colbert, *supra* note 2, at 88-93.

the *Batson* line of cases would not require the review of those peremptory challenges that *McCollum* describes. The Court's equal protection doctrine forbids not all court-approved, race-conscious jury selection, but only that race-conscious jury selection *designed to perpetuate total exclusion of one race.*

McCollum held that a defense attorney's use of peremptory challenges to exclude *all* the black members of the venire violated those jurors' equal protection rights.[113] Given twenty peremptory challenges,[114] the attorney could remove all 18 blacks from the jury venire.[115] But such would not be the case were the scenario reversed.

Consider Chief Justice Burger's hypothetical scenario in his dissent in *Batson*.[116] There he predicted the holding of *McCollum* (that once prosecutors were denied race-based peremptory challenges, defendants would be as well), and declared that peremptory challenges would shortly disappear altogether. He predicted dire consequences for all criminal defendants:

> Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior . . . ." Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," that these white jurors will be prejudiced against him, presumably based in part on race.[117]

Chief Justice Burger postulated that the Asian defendant would not be able to strike these white, prejudiced jurors, and a racially biased verdict would result.[118]

Doctrinally, however, Chief Justice Burger's *in terrorem* argument is simply incorrect. The rights of those white jurors, asserted by the prosecutor on their behalf, do not pose the same equal protection problem as that in either *Batson* or *McCollum* because the Asian defendant cannot strike *all* the white venire members and design for himself a fully Asian jury. Whereas white defendants can exclude minority jurors to effect a minority-free jury, minority jurors can generally only exclude whites to effect a jury with some non-whites on it. This difference, rooted in mathematical proportions and the parties' underlying motives, has constitutional significance.

Justice Thomas also alluded to the question of whether black de-

113. Georgia v. McCollum, 112 S. Ct. 2348, 2356-57 (1992).

114. Under Georgia law, a defendant gets 20 peremptory challenges when indicted for an offense carrying a penalty of four or more years. GA. CODE ANN. § 15-12-165 (1990).

115. *McCollum*, 112 S. Ct. at 2351.

116. *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting).

117. *Id.* at 128 (Burger, C.J., dissenting)(citations omitted).

118. *Id.*

fendants could strike white jurors in his concurrence in *McCollum*.[119] The NAACP, as amicus curiae in *McCollum*, urged that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors."[120] Justice Thomas opined that the difference was illusory, and that while the issue "technically remains open, in his opinion, the result would be the same if black defendants struck white jurors.[121] For the reasons we have identified, we believe that issue does remain open, and that nothing in the prior case law compels the conclusion Justice Thomas's concurrence might suggest. The Court's focus on jurors' rights needs a careful definition of those rights, not a wooden application of *McCollum* to jurors of every race, even in the name of race-blind, even-handed application of the law.

B. *Ideological Considerations*

Not only does a doctrinal analysis lead to the conclusion that the *Batson* line of cases should not extend to the challenge of white jurors, but ideological concerns also compel that conclusion. The communitarian principles that drove the Court's shift from the rights of the defendant to the equal protection rights of jurors call for a consideration of the likely effects of the Court's decisions on public confidence and trust in the judicial system generally.

Justice Blackmun noted that when white defendants on trial for "white on black" crime strike every black juror, the public recognizes not only that the jurors have suffered an injustice, but also that the court has sanctioned it. As mentioned previously, black defendants strike white jurors either to ensure that some black jurors sit on the jury or to eliminate those suspected of racial bias who cannot be identified during the cause portion of the voir dire.[122] When a court permits challenges for either of those reasons, the public is less likely to perceive the same injustice.

First, the white jurors struck are not members of a group which has been historically excluded from jury service either de jure or de facto.[123] The exclusion of white jurors from the trial of a black defendant, therefore, does not recall the historical exclusion of one particular group based on an earlier, pernicious system of discrimination. Second, because of their historical institutional dominance, white citizens' faith in the judicial system is not as precarious as that of black citizens, at least with respect to service on juries, on which whites have always participated.[124] Whites excused from a jury venire are not as likely to suspect that the trial will go forward with utter disregard for them as a class,

119. 112 S. Ct. at 2360 (Thomas, J., concurring).

120. 112 S. Ct. at 2360 n.2 (quoting Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* at 3-4).

121. 112 S. Ct. 2360 n.2 (Thomas, J., concurring).

122. *See supra* note 112 and accompanying text.

123. *See* Colbert, *supra* note 2, at 88-93.

124. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611,

since their exclusion from the jury will not likely result in an all non-white jury.

Finally, minority defendants who are rendered unable to strike white jurors whom they suspect to be racially prejudiced are the most likely to lose faith in the system. The purpose of the peremptory challenge—to protect defendants against prejudice favoring the state and to encourage public confidence in jury verdicts—will be undermined just as Chief Justice Burger warned in his dissent in *Batson*. Widespread distrust of the legal system among large minority communities hardly ensures the kind of united, law-abiding society the Court purportedly wants.

IV. CONCLUSION

The Supreme Court has shown a consistent resolve to confront the peremptory challenge-equal protection conflict by endorsing a compromise solution: preserve peremptory challenges, but cabin them within the bounds of equal protection. Doctrinally, the Court has altered its focus from defendant to jurors in articulating the equal protection rights at stake. It has underscored those jurors'—as a proxy for all of society's—trust and confidence in the judicial system.[125]

In deciding how far to extend the rules it adopted in the *Batson* line of cases, the Court should closely examine the doctrinal and ideological considerations that have motivated it thus far. The Court's commitment to preserving peremptory challenges, while advancing the communitarian concerns underlying jury service, argues for a narrow definition of those jurors' rights. While *McCollum* subjected the peremptory challenges of black jurors by white criminal defendants to review, it would be inconsistent with the Court's concerns both for the peremptory challenge and for the public's faith in the system to apply this rule mechanically to the reverse situation. Race-conscious peremptory challenges are not the inherent stain on the system. What offends equal protection and the public's regard for that system are vestiges of white exclusion of minorities from meaningful participation in civic life. To the extent peremptory challenges serve other purposes, they should be scrupulously protected.

1613 (1985). *See also* Hagan & Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329 (1982).

125. This compromise has still not clarified how courts should weigh defendants' and jurors rights in every circumstance, however. *Compare* Ramseur v. Beyer, No. 90-5333, slip op. at 22-23 (3d Cir. Dec. 31, 1992) (holding a judge's singling out of black grand jurors does not violate the Equal Protection Clause where no juror was actually excluded, and where the judge did not countenance racial prejudice against jurors so much as seek to create a racially-balanced jury) *with id.* at 56-57 (Alito, J., concurring) (emphasizing the equal protection rights of criminal defendants whose cases are presented to cross-section grand juries as opposed to randomly selected grand juries).